WAKIL DIRI BAGI ASSAHARI DAUD

v.

MERIAM ISHAK & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
ABDUL AZIZ MOHAMAD JCA
JAMES FOONG J
[CIVIL APPEAL NO: T-02-558-01]
4 JUNE 2004

CIVIL PROCEDURE: *Appeal - Hearing of appeal - Appeal relates only to part of decision of learned judge - Whether court has power to correct error in decision not appealed from - Courts of Judicature Act 1964, s. 69(4) and (5)*

DAMAGES: *Personal injuries - Liability, finding of - Road accident - Second and third defendants found jointly and severally liable after first defendant found 100% liable - Whether finding irreconcilable - Whether finding on third party also incorrect - Whether s. 69(4) and (5) Courts of Judicature Act 1964 applicable*

This was an appeal by the personal representative of the deceased first defendant against the decision of the learned judge finding the first defendant 100% liable for a road accident involving a bus and three other motor vehicles. In a consolidated suit before the learned judge, the first defendant was the driver of one of the motor vehicles whilst the second and third defendants were the driver and owner of the bus respectively. The administrator of the estate of the first defendant was joined in as third party.

Held (dismissing the appeal)
Per Abdul Kadir Sulaiman JCA delivering the judgment of the court:

[1] On the evidence before him, the learned judge was correct in finding the first defendant 100% liable. Accordingly, there was no merit in the present appeal. However, in light of the learned judge attaching 100% liability on the first defendant, his finding that the second and third defendants were jointly and severally liable was irreconcilable and wrong in law. Accordingly, his finding that the third party was also liable by way of indemnity should not arise. Section 69(4) and (5) of the Courts of Judicature Act 1964 was applicable to correct the finding of the learned

judge in respect of the second and third defendants and third party notwithstanding the absence of any appeal by them. The order of the learned judge to that extent was quashed. (pp 123 d-e, 125 b-h & 126 a)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh wakil diri responden pertama, simati, terhadap keputusan yang arif hakim kerana mendapati defendan pertama 100% bertanggunggan atas satu kemalangan jalanraya yang melibatkan sebuah bas dengan tiga kenderaan bermotor lain. Dalam tindakan bersepadu di hadapan yang arif hakim, defendan pertama adalah pemandu salah sebuah kenderaan bermotor sementara defendan kedua dan ketiga masing-masing adalah pemandu dan pemilik bas. Pentadbir pusaka defendan pertama pula dimasukkan sebagai pihak ketiga.

Diputuskan (menolak rayuan)
Oleh Abdul Kadir Sulaiman HMR menyampaikan penghakiman mahkamah:

[1] Atas keterangan yang ada di hadapannya, yang arif hakim betul apabila mendapati defendan pertama bertanggungan 100%. Dengan itu, rayuan ini adalah tidak bermerit. Bagaimanapun, oleh kerana yang arif hakim telah meletakkan tanggungan 100% ke atas defendan pertama, pendapatnya bahawa defendan kedua dan ketiga bertanggungan secara berasingan dan bersesama adalah tidak masuk akal dan salah di sisi undang-undang. Atas alasan yang sama, pendapatnya bahawa pihak ketiga adalah juga bertanggungan secara indemniti tidak seharusnya berbangkit. Seksyen 69(4) dan (5) Akta Mahkamah Kehakiman 1964 adalah terpakai bagi membetulkan pendapat yang arif hakim berhubung dengan defendan kedua dan ketiga serta pihak ketiga, walaupun tiada sebarang rayuan dibuat oleh mereka. Perintah yang arif hakim dibatalkan sekadarnya.]

Legislation referred to:
Courts of Judicature Act 1964, s. 69(4), (5)

For the appellant - CM Maran; M/s VP Nathan & Partners
For the respondents - Indran Rajalingam (Zamani, Othman Bakar, Harpal, Avinder, Jasvinjit & Joseph Au); M/s AJ Ariffin Yeo & Harpal; M/s Omar & Joseph Au; M/s Zamani Mohammad & Co; M/s Sandu & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Kadir Sulaiman JCA:

This is an appeal by the personal representative of a deceased motor car driver, Assahari bin Daud, whose car was involved in a collision with bus No. TK 7238, driven by the second defendant and owned by the third defendant in a road accident at Kampung Pasir Putih, Merchang, Terengganu near kilometer 48 ¾ Jalan Kuala Terengganu/Dungun on 19 June 1993, in a consolidated suit No. 23-01-96. In this motor accident, 4 vehicles in all were involved, including the said motor car and the said bus. Three of the vehicles were traveling north from the direction of Dungun towards Kuala Terengganu, and the motor bus was traveling in the opposite direction. The 3 vehicles traveling in the northerly direction were the motor car No. CG 7110, motor van No. DJ 3225 and motor trooper No. TH 5000. The driver of the motor car died in the accident.

Altogether 4 suits were filed in connection with the said road accident, one in the High Court at Kuala Terengganu and three in the lower courts at Kuala Terengganu. They were:

(a) High Court Civil Suit Nos 23-3-1994

(b) Sessions Court Summons No. 53-95-95

(c) Magistrates Court Summons No. 73-89-95

(d) Magistrates Court Summons No. 73-99-94

Subsequently, all cases above came before the High Court for consolidation and all the four suits became a single High Court Civil Suit No. 23-01-96 ("the consolidated suit"). The original plaintiffs in (a) above become the first, second, third and fourth plaintiffs respectively. The plaintiffs in (b) become the fifth, sixth, seven, eight and ninth plaintiffs, respectively. The plaintiffs in (c) become the tenth and eleventh plaintiffs, respectively, and the single plaintiff in (d) above becomes the twelfth plaintiff in the consolidated suit. The appellant who was the first defendant in (a) above remains so in this consolidated suit. The other two defendants in (a), (b), (c) and (d) above are now the second and third defendants in the consolidated suit. The third party, Mek Ragayah binti Salleh (as the administrator of the estate of the deceased car driver) in (a), (b), (c) and (d) above now becomes the third party in the consolidated suit.

This consolidated suit came on for hearing before the learned judge. At the end of the hearing this is what he says in his grounds of judgment in relation to the liability of the parties in the consolidated suit:

19. On liability

For reasons given above, I find that the car driver was solely to be blamed. It follows, therefore, that **with regard to claim by first plaintiff, second plaintiff, third plaintiff, fourth plaintiff, tenth plaintiff, and eleventh plaintiff,** first defendant is wholly liable. Accordingly, I enter judgment against first defendant.

20. However, **with regard to claim by the other plaintiffs (who did not sue first defendant),** second defendant and third defendant are jointly and severally liable. Accordingly, I enter judgment against both first and second defendant.

21. **With reference to third party proceeding instituted by second and third defendant,** third party is wholly liable, hence I enter judgment against third party. (emphasis added)

Having fixed the various liabilities on the parties concerned this is what the learned judge says in relation to the quantum of damages to be awarded to the various plaintiffs in the consolidated suit:

22. On quantum

In the light of no objection by En. Joseph Au, counsel for second defendant and third defendant and based on submission by the parties, I order as follows:

As against first defendant:

Plaintiff No. 1	
Special damages	RM 5,019/-
Dependency claim:	
Pre-trial	RM 30,000/-
Post-trial	RM 29,000/-
Plaintiff No. 2	
Special damages	RM 100/-
General damages	RM 10,000/-
Plaintiff No. 3	
Special damages	RM 1,100/-
General damages	RM 10,000/-

Plaintiff No. 4

Special damages	RM 100/-
General damages	RM13,000/-

Plaintiff No. 10

Special damages	RM 1,900/-
General damages	RM 2,000/-

Plaintiff No. 11

Special damages	RM 140/-
General damages	RM 3,500/-

As against second and third defendants:

Plaintiff No. 5, 6, 7, 8, 9

Special damages (general items) RM 5,899

(agreed)

Plaintiff No. 5

General Damages	RM 2,500/-
Bereavement (for 3 persons) (RM 10,000/- each)	RM 30,000/-
Dependency claim:	
Pre-trial	RM 37,800/-
Post trial	RM 30,600/-

Plaintiff No. 6 (Nornashuha)

General damages RM 36,000/-

Plaintiff No. 7 (Norshuhada)

General damages RM 11,000/-

Plaintiff No. 8 (Norfarah Hanim)

General damages RM 9,000/-

Plaintiff No. 9 (Azimah)

General damages RM 2,500/-

Plaintiff No. 12

Special damages	RM 2,870/-
General damages	RM 56,000/-

Interest will be at 8% p.a. on general damages from date of service of writ to date of realization and 4% p.a. on special damages from date of accident to date of judgment and thereafter at 8% p.a. to date of realization.

24. In the light of no objection by En. Omar, counsel for first defendant and third party and based on submission by En. Joseph Au, counsel for second and third defendant, I order that in respect of damages and costs obtained by fifth plaintiff, sixth plaintiff, seventh plaintiff, eight plaintiff, ninth plaintiff and twelfth plaintiff against second and third defendant to be borne by third party.

Against this decision by the learned judge, Daud bin Yahya wakil diri bagi (the personal representative of) Assahari bin Daud, the first defendant in the consolidated suit by a notice dated 29 June 2001 filed this appeal. At the hearing of the appeal the appellant was represented by counsel, En. C.M. Maran. There was also a cross appeal by the 5 plaintiffs in original Suit No. 53-95-95 mentioned in para. 2(b) above, who are the fifth to the ninth plaintiffs in the consolidated suit. We say no more about this cross appeal because at the proceeding before us, En. Harpal, learned counsel for the said plaintiffs withdrew the cross appeal and requested for no order be made on costs. The cross appeal was accordingly, struck off with no order made as to costs.

On the appeal proper, it is to be noted that the appellant is the first defendant in original Suit No. 23-3-94 mentioned in para. 2(a) above and in this consolidated Suit. He was sued as personal representative of the deceased driver of the car involved in the accident on that fateful day. On the evidence before the learned judge, with whose finding on liability we agree, we find no merit in the appeal on the finding that he was solely to be blamed for the accident. Coupled with that, the learned counsel before us also conceded on the finding by the learned judge. In the circumstances, there was nothing left for us but to dismiss the appellant's appeal with costs to the first, second, third, fourth, tenth and eleventh plaintiffs in the consolidated suit.

But that is not the end of the matter. The third party in the consolidated suit, Mek Ragayah binti Salleh was brought in by the second and third defendants in her capacity as the administrator of the deceased driver's estate, and the first defendant in the consolidated suit, Daud bin Yahya, who is the appellant here, was being sued by the various plaintiffs in his capacity as the personal representative of the deceased driver. So both of them are involved in the affairs of the same deceased driver of the car, Assahari bin Daud. However, the third party did not lodge any appeal against the decision of the learned judge in this consolidated suit holding her wholly liable in the third party proceeding instituted by the second and the third defendants. It is unfortunate that upon the grant of the letters of administration over the estate of the deceased driver to the third party, no attempt was made by the plaintiffs in original Suit No. 23-3-94 mentioned in para. 2(a) above to substitute the appellant who originally stood in the capacity of the personal representative of the deceased driver with that of Mek Ragayah binti Salleh in the capacity of the administrator, as the first defendant in the suit.

Be that as it may, according to the learned judge in his judgment, addressing his mind upon the accident that happened on that day, the effective cause of the accident was due to sudden swerving of the car into the path of the bus. "The bus driver applied brakes and swerved. On the facts and circumstances of instant case, I am satisfied that the bus driver had exercised ordinary care and skill so as to avert the collision." The learned judge continues:

> It is my conclusion that with the bus going at the speed of 60 km per hour, it did not contribute towards the accident.

He disagreed with the contention that the bus was speeding. To him it could be due to the bus going out of control on wet surface. It is to be noted that the accident happened after a drizzle causing the road surface to be wet. For those reasons, the learned judge found that the motor car driver who was the first defendant in the court below and the appellant before us, was solely to be blamed and affixed 100% liability on the motor car driver in favour of the first, second, third, fourth, tenth and eleventh plaintiffs in the consolidated Suit, who were respectively, the first to the fourth plaintiffs in original Suit No. 23-3-94 and the first and second plaintiffs in original Suit No. 73-89-95, mentioned in para. 2(a) and (c) above, respectively.

Having absolved the bus which driver and its owner are being sued as the second and third defendants in the consolidated suit, of liability consequent upon the collision with the motor car, with no reason given, the learned judge made a finding as found at paras. 20 and 21 of his judgment cited earlier, thus:

> 20. However, with regard to the claim by the other plaintiffs (who did not sue first defendant), second defendant and third defendant are jointly and severally liable. Accordingly, I enter judgment against both first and second defendant. (Quaere: whether the learned judge meant the second and the third defendants in his last sentence?)
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> 21. With reference to third party proceedings instituted by second and third defendant, third party is wholly liable, hence I enter judgment against third party.

Lest we forget, the first defendant is the appellant before us, the second defendant is the bus driver and the third defendant is the bus owner. The other plaintiffs who did not sue the first defendant are:

(a) the fifth to the ninth plaintiffs in the consolidated suit who are the first to the fifth plaintiffs in the original Suit No. 53-95-95, mentioned in para. 2(b) above, and

(b) the twelfth plaintiffs in the consolidated suit who is the sole plaintiff in the original Suit No. 73-99-94 mentioned in para. 2(d) above.

All these plaintiffs sued only the bus owner and the driver.

In the light of the attachment of the 100% liability on the motor car driver, who was represented by the appellant as the first defendant in the consolidated suit, thereby absolving the bus driver and its owner of the blame over the accident, the finding of the learned judge in his para. 20 mentioned earlier seemed to be irreconcilable and wrong in law. Was the reason for making the second and the third defendants jointly and severally liable so as to benefit the other plaintiffs who did not sue the first defendant, the appellant? If the learned judge was correct in entering "judgment against both first and second defendant" in favour of these plaintiffs, what about the third defendant, the bus owner?

Again for no reason given, para. 21 of the learned judge's judgment attaches liability on the third party who is not the appellant before us, having held earlier that the bus is not to be blamed for the accident. The purpose of a third party proceeding is for the losing defendant to recover indemnity from the third party over the fault created by the third party. However in this case, as the bus was held not to be blamed for the accident the issue of liability against the third party for indemnity would not have arisen.

Our attention is drawn to the provisions of s. 69(4) and (5) of the Courts of Judicature Act 1964 so as to correct the error committed by the learned judge in attaching liability against the second and the third defendants (the bus driver and its owner) and also against the third party (the administrator of the estate of the deceased motor car driver) by way of indemnity, notwithstanding the absence of any appeal by them over the decision. The said sub-sections state:

> (4) The Court of Appeal may draw inferences of facts, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.

Having considered the provisions of the section of the Act and in the light of the learned judge's primary finding that the deceased motor car driver (represented by the appellant in this case and having conceded by the learned counsel as to such finding) was wholly to be blamed in respect of the accident, we find that the entry of judgment against the bus driver and the bus owner and making the third party to indemnify the bus driver and the owner, is clearly

erroneous in law and against the weight of the evidence. To that extent, the order of the learned judge made against the second and the third defendants and the third party has to be quashed.

My learned brother Abdul Aziz bin Mohamad JCA and James Foong Cheng Yuen JHC have read this judgment in draft and stated that they concurred with the reasoning and the conclusion.

In the upshot, since the appellant is only involved in the original Suit Nos. 23-3-94 and 73-89-95 mentioned in paras. (a) and (c) above he is wholly liable to the respective plaintiffs therein only, who are the first, second, third, fourth, tenth and eleventh plaintiffs in the consolidated suit. The liability and the quantum of damages awarded therein by the learned judge are accordingly affirmed. The appellant's appeal herein is dismissed with costs to the said plaintiffs in the light of the concession made as to the correctness of the decision of the learned judge with which we agree. The decision of the learned judge, however, as against the first and second defendants in the original Suit Nos. 53-95-95 and 73-99-94 mentioned in paras. (b) and (d) above being the bus owner and its driver respectively, and the decision as against the third party for indemnity in favour of the plaintiffs therein are accordingly quashed as to both liability and quantum. As to costs, we make no order on the appeal but the orders for costs against them in the court below are hereby set aside.